

# Is the creation of a discrete offence of coercive control necessary to combat domestic violence?<sup>1</sup>

VANESSA BETTINSON

*Lecturer in Law, Leicester De Montfort Law School*

AND

DR CHARLOTTE BISHOP

*Lecturer in Law, University of Exeter*

There is currently significant political interest in strengthening the criminal justice response to domestic violence and/or abuse. To this end the Serious Crime Act 2015, s 76, includes a new offence of controlling or coercive behaviour in an intimate or family relationship.<sup>2</sup> The motivation for this offence partially derives from Her Majesty's Inspectorate of Constabulary (HMIC), *Everyone's Business: Improving the Police Response to Domestic Abuse*, which highlighted that, although there were pockets of good police practice in this area, too many forces were responding in an overtly inadequate manner. The report found a lack of understanding of what domestic violence and/or abuse entailed.<sup>3</sup> Evidence suggests that the police are not unusual in this, with many people associating domestic violence and/or abuse with physical forms of violence.<sup>4</sup> That the report has been the impetus to reflect on how domestic violence and/or abuse is criminalised in England and Wales is further confirmed by the Law Commission's acknowledgment of 'the continuing concern about the policing of domestic violence'.<sup>5</sup> Historically, such prosecutions for crimes occurring within the context of domestic violence and/or abuse have been

1 The difficulty in defining this term is discussed within the article itself.

2 Also see Serious Crime HC Bill (2014–2015) [160], cl 73. Originally the proposed offences included the offence of coercive control in a domestic setting and domestic violence in Serious Crime Bill 2014–2015, Notices of Amendment 7 January 2015. Following Home Office, *Strengthening the Law on Domestic Abuse Consultation – Summary of Responses* (December 2014); Home Office, *Strengthening the Law on Domestic Abuse – A Consultation* (August 2014); In addition, reflection on reforming domestic violence and/or abuse are included in the Law Commission, *Reform of Offences Against the Person: A Scoping Consultation Paper* (Law Commission Consultation Paper No 217, November 2014).

3 HMIC, *Everyone's Business: Improving the Police Response to Domestic Abuse* (HMIC 2014); A Musgrove and N Groves, 'The Domestic Violence, Crime and Victims Act 2004: Relevant or "Removed" Legislation?' (2008) 29 (3–4) *Journal of Social Welfare Law* 233, 240, found that 'police responses have, in some cases, moved well beyond the stereotyped image of their past indifference'.

4 S Walby and J Allen, *Home Office Research Study 276 Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey* (Home Office Research, Development and Statistics Directorate March 2004). Walby and Allen found that victims of domestic violence and/or abuse were more likely to seek help where the violence was physical or if they were severely injured and those who named incidents as domestic violence were more likely to seek help than those who did not.

5 Law Commission (n 2) s 144.

hampered by several factors including police responses to these offences<sup>6</sup> and the high level of retraction by victims themselves.<sup>7</sup> There have been significant advances in prosecutorial practices and data collection has also been introduced.<sup>8</sup> There remains, however, an inability by the substantive criminal law to capture the distinctive nature of coercive control that is, arguably, a defining feature of many cases of domestic violence and/or abuse.<sup>9</sup> Empirical research in this area suggests that domestic violence and/or abuse is systemic within society and, where coercive conduct is used, it is programmatic in nature.<sup>10</sup> Due to the focus on single incidents of violence within the legal framework, there was a failure to take into account the actual harm experienced by many victims of domestic violence and/or abuse which occurs through coercive behaviours of the perpetrator.<sup>11</sup> The new offence centres on coercive and controlling behaviour, seeking to capture the parameters of an intimate relationship, and expressly includes non-physical forms of coercive behaviour.

This article seeks to assess the potential application of the new offence of controlling or coercive behaviour in an intimate or family relationship. In this endeavour a discussion of the evolving understandings of domestic violence and/or abuse will be undertaken to show the difficulty in defining offences in this area and the importance of doing so. This will provide the context for the argument that both physical and non-physical forms of coercive control in a domestic relationship should be criminalised. Judicial interpretation of related offences and a preoccupation with an incident-based approach has meant that the reality of domestic violence and/or abuse experienced by victims is, in practice, not criminalised. This stands in contradiction to the Home Office's non-statutory definition of domestic violence and/or abuse.<sup>12</sup> Criminalisation provides the opportunity to

- 6 For explanations on the unwillingness of domestic violence and/or abuse victims to cooperate with the criminal justice system, see A L Robinson and M S Stroshine, 'The Importance of Expectation Fulfilment on Domestic Violence Victims' Satisfaction with the Police in the UK' (2005) 28(2) *Policing: An International Journal of Police Strategies and Management* 301–20; C Humphreys and R Thiara, *Routes to Safety: Protection Issues Facing Abused Women and Children and the Role of Outreach Services* (Women's Aid Federation of England 2002).
- 7 A Cretney and G Davis, 'Prosecuting Domestic Assault: Victims Failing Courts, or Courts Failing Victims?' (1997) 36(2) *Howard Journal of Criminal Justice* 146; I. Ellison, 'Prosecuting Domestic Violence without Victim Participation' (2002) 65(6) *Modern Law Review* 834; A Robinson and D Cook, 'Understanding Victim Retraction in Cases of Domestic Violence: Specialist Courts, Government Policy, and Victim-Centred Justice' (2006) 9(2) *Contemporary Justice Review* 189; Crown Prosecution Service, *Violence against Women and Girls: Crime Report* (2010–2011) <[www.cps.gov.uk/publications/equality/vaw/index.html#a02](http://www.cps.gov.uk/publications/equality/vaw/index.html#a02)> accessed 15 April 2015; V Bettinson, 'Restraining Orders Following an Acquittal in Domestic Violence Cases: Securing Greater Victim Safety?' (2012) 76(6) *Journal of Criminal Law* 512.
- 8 Crown Prosecution Service, *Violence against Women and Girls: Crime Reports 2013–2014 and 2008–2011* <[www.cps.gov.uk/publications/equality/vaw/index.html#a02](http://www.cps.gov.uk/publications/equality/vaw/index.html#a02)> accessed 14 April 2015.
- 9 V Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom Based Account' (2004–2005) 65 *Louisiana Law Review* 989; J B Kelly and M P Johnson, 'Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46(3) *Family Court Review* 476 lists different categories of domestic violence and/or abuse.
- 10 Tadros (n 9); E Williamson (2010) 'Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control' 106(2) *Violence Against Women* 1412; E Stark (2009) 'Rethinking Coercive Control' (2009) 15(12) *Violence Against Women* 1509; T L Kuennen, (2007) 'Analysing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much?' 22 (1) *Berkeley Journal of Gender Law and Justice* 2.
- 11 E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (OUP 2007); Stark (n 10) where his theory describes coercive control as amounting to a deprivation of liberty (explored below).
- 12 The Home Office cross-government definition of domestic violence and abuse states that domestic violence and abuse involves: 'Any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality'; Home Office, *Guidance: Domestic Violence and Abuse* (March 2013).

promote a clearer understanding of the lived experience of domestic violence and/or abuse that many victims suffer. Legal clarity will aid victims of controlling and coercive behaviours by strengthening confidence to seek support either from the criminal justice system or alternative agencies.<sup>13</sup> However, the potential for the introduction of the new offence to provide clarity and to address misperceptions that real domestic violence and/or abuse involves only physical violence depends upon whether changes to legal doctrine can be translated into legal practice.<sup>14</sup> This article will explore challenges to the application of the proposed offence to consider whether they are necessarily able to combat domestic violence and/or abuse.

### Why criminalise controlling and coercive behaviour as a form of domestic violence?

The role of the criminal law is significant in that it illustrates wrongful behaviour, carefully categorised to reflect the different degrees of harm that are not tolerated by society. Despite this, criminal law is limited in what it can achieve in terms of combating domestic violence. As Hanna succinctly explains:

Although the legal system alone cannot end violence against women, its role in providing remedies to victims and deterring abusers is central to the greater social struggle.<sup>15</sup>

In this the authors are agreed: a new discrete offence nonetheless could support change and clarify the behaviour and harm of domestic violence and/or abuse and, as Tadros emphasises, sends a 'symbolic' message, as well as providing practical means for change.<sup>16</sup> Supporting the criminalisation of domestic violence and/or abuse is in line with the criminalisation of other activities. As Ashworth indicates, the criminal law is not solely concerned with the interests of the wronged individual but also with behaviour that is 'against some fundamental social value or institution'.<sup>17</sup> Duff argues that within a domestic dispute the harm:

should be condemned by the whole community as an unqualified wrong; and this is done by defining and prosecuting it as a crime.<sup>18</sup>

The importance of prosecuting domestic violence and/or abuse for the public interest, and not solely the individual victim, is further emphasised by Dempsey. Concerned with the philosophical arguments for the prosecution of domestic violence, she argues that it is insufficient to just criminalise the wrong for symbolic reasons. Any criminalisation that seeks to achieve condemnation of the wrong must be habituated within the system and consistently applied, rather than being merely a series of random condemnatory incidents. For this habituation to occur, a successful prosecution system must exist that 'promotes the freedom of future victims'.<sup>19</sup> The criminal justice system is unable to achieve this with a

13 Such agencies include charitable support groups for domestic abuse victims, families and perpetrators seeking to address their behaviours.

14 C Hanna, (2009) 'The Paradox of Progress: Translating E Stark's Coercive Control into Legal Doctrine for Abused Women' 15(12) *Violence Against Women* 1460.

15 Ibid 1458; Tadros (n 9) 1010.

16 Tadros (n 9) 1011.

17 A Ashworth, *Principles of Criminal Law* (OUP 2005) 1.

18 R A Duff, *Punishment, Communication and Community* (OUP 2001) 62.

19 M Madden Dempsey, 'Toward a Feminist State: What Does "Effective" Prosecution of Domestic Violence mean?' (2007) 70(6) *Modern Law Review* 908, 912. For a reflection on Dempsey's work see S Cowan, 'Motivating Questions and Partial Answers: A Response to Prosecuting Domestic Violence by Michelle Madden Dempsey' (2014) 8(3) *Criminal Law and Philosophy* 543.

focus on physical harm rather than restraints on a person's capacity to exercise their freedom fully.

The premise that criminal law should be concerned with criminalising domestic violence and/or abuse has gained wide acceptance internationally and is certainly reflected through the UK's international obligations deriving from the Convention on the Elimination of all forms of Discrimination Against Women 1979 (CEDAW)<sup>20</sup> and recent jurisprudence from the European Court of Human Rights (ECtHR).<sup>21</sup> Despite this progress, there remains the challenge of clearly understanding and defining what domestic violence and/or abuse is. Physical forms of non-consensual violence are addressed by a number of non-fatal offences where context is irrelevant to the requirements of the offence. However, where physical and non-physical forms of violence and/or abuse occur within a relationship, context is crucial. Tuerkheimer emphasises the importance of context, arguing that the law needs to be capable of considering the relationship as a whole. This would enable courts to see that the coercive and controlling behaviour connects seemingly unrelated events.<sup>22</sup> Hanna endorses the reframing of domestic violence and/or abuse with coercive control as its focus 'from an evidentiary perspective, the complete narrative of the relationship becomes relevant' and 'recognises the ongoing loss of autonomy the victim suffers'.<sup>23</sup> Before considering the potential application of the new offence, it is important to reflect upon the changing understandings of domestic violence and/or abuse. Evolving definitions continue and can explain, to some extent, the criminal law's traditional failure to reflect the programmatic nature of some forms of domestic violence and/or abuse in the absence of legislative guidance.

### Evolving definitions of domestic violence and/or domestic abuse

A Home Office Consultation and proposals under the Serious Crime Bill 2014–2015<sup>24</sup> reflect the difficulties that persist in defining domestic violence and whether it includes, or takes a different form to, domestic abuse. To be applied and enforceable, an offence needs to have a clear definition and substantive legal terms. As Groves and Thomas explain, before a term can be defined, its existence needs to be named. Otherwise 'it is impossible to speak about'<sup>25</sup> and, by extension, impossible to criminalise. The Home Office consultation paper preferred the phrase domestic abuse and in the summary of responses referred to the Home Secretary's announcement that she will 'include a new offence of domestic abuse as an amendment to the Serious Crime Bill'.<sup>26</sup> Section 76 retains domestic

20 In its General Recommendation 19, the CEDAW Committee interpreted CEDAW in such a manner as to encompass domestic violence. For an extensive overview of relevant international provisions, see B Meyersfeld, *Domestic Violence and International Law* (Hart 2010).

21 For example, *Opuz v Turkey* (2010) 50 EHRR 28; *Bevacqua and S v Bulgaria*, App no 71127/01 (ECtHR 12 June 2008); *Eremia and Others v the Republic of Moldova*, App no 3564/11 (ECtHR 28 May 2013); *Valiulene v Lithuania*, App no 3334/07 (ECtHR 26 March 2013). In addition the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention) 2011 entered into force 1 August 2014 for states who have ratified it. The UK is yet to ratify the treaty, although did sign it on 8 June 2012.

22 D Tuerkheimer, 'Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence' (2004) 94(4) *Journal of Criminal Law and Criminology* 1019–20.

23 Hanna (n 14) 1462.

24 Home Office, *Strengthening the Law on Domestic Abuse – A Consultation* (n 2); Serious Crime Bill 2014–2015, Notices of Amendment, 7 January 2015.

25 N Groves and T Thomas, *Domestic Violence and Criminal Justice* (Routledge 2014) 1.

26 Home Office, *Strengthening the Law on Domestic Abuse Consultation – Summary of Responses* (n 2) 11.

abuse as its heading, although the term is not reflected in the substantive requirements of the offence. In the initial proposed amendment introducing an offence of coercive control, the term domestic abuse was avoided.

This uncertainty concerning the term domestic abuse is unsurprising when the complexities of its origins are considered. An examination of the history of naming domestic violence and/or abuse illustrates that, as a society, our understanding of what these concepts are, and whether they are one and the same, is incomplete and evolving.<sup>27</sup> Given this, it is unsurprising that the criminal justice system has tended to focus on incident-based, physical forms of violence<sup>28</sup> which were already within its ambit. Even victims themselves usually associate the term domestic violence with physical violence as Walby and Allen's research showed.<sup>29</sup> Victims from their sample were more likely to describe what happened to them as domestic violence and self-identify as victims where they had experienced physical violence and injuries. And yet the impact of non-physical behaviours upon a victim's psychological well-being can be more damaging than a one-off incident of physical violence.<sup>30</sup>

Stark reconceptualised domestic violence and/or abuse as coercive control. He concluded that the law should redefine domestic violence and/or abuse as conduct intended to undermine another person's autonomy, freedom and integrity.<sup>31</sup> Similarly, Tadros has argued that two features 'distinguish domestic abuse from other types of violent conduct. It's setting in an intimate relationship and its "systematic" nature.'<sup>32</sup> These features serve to erode the distinctive kind of freedom a person has. Whereas many criminal offences protect individuals against 'the reduction of options', domestic abuse involves not only the options of the victim being reduced, but also the options that remain being subject to unwarranted and arbitrary control by another person.<sup>33</sup> Consequently, the victim's capacity to appreciate and see all the actual options available to them is controlled by another. Stark describes the dynamics of coercive control as 'the microregulation of everyday behaviours' with resistance to this microregulation leading to punishment.<sup>34</sup> Kuennen referred to coercive control as an 'ongoing strategy of intimidation, isolation, and control' and emphasised that the behaviour of the perpetrator impacts upon all aspects of the victim's life.<sup>35</sup> For this reason, Stark and Williamson refer to domestic violence and/or abuse in the form of coercive control as a 'liberty crime', best understood as a pattern or programme of behaviours.<sup>36</sup> Stark argues that the law should reframe the definition of domestic violence and/or abuse to encompass coercive control:

as a course of conduct crime much like harassment, stalking, or kidnapping, rather than as a discrete act, and highlight its effects on liberty and autonomy.<sup>37</sup>

27 For a comprehensive account, see Groves and Thomas (n 25) ch 1.

28 As illustrated by analysis of relevant jurisprudence below.

29 Walby and Allen (n 4).

30 Stark (n 10); Tadros (n 9); Williamson (n 10).

31 Stark (n 11).

32 Tadros (n 9).

33 Ibid 998.

34 Stark (n 11) 5. Dutton and Goodman also provide a more expansive account of the dynamics of coercive control in an intimate relationship: see M A Dutton and L A Goodman, 'Coercion in Intimate Partner Violence: Toward a New Conceptualization' (2005) 52 Sex Roles 743.

35 Kuennen (n 10).

36 Williamson (n 10).

37 Stark (n 11) 382.

Dutton and Goodman reveal some difficulties with using the course of conduct model. A victim is particularly vulnerable to coercion and control, even when the immediate threat is relatively minor, if she has experienced violence from her partner already because the possibility remains that it will happen again.<sup>38</sup> As the rules become internalised and automatically performed by the victim, less and less physical violence and other punishing behaviour is needed to ensure compliance. In many abusive relationships the rules set by the perpetrator do not even need to be verbally expressed to create an atmosphere that is controlled by the abuser.<sup>39</sup> Signals and other covert messages will often have meaning only in the context of the relationship: 'a gesture that seems innocent to an observer is instantly transformed into a threatening symbol to the victim of abuse'.<sup>40</sup> The implication being that whether these threats are coercive or not cannot be judged objectively; they depend upon the social context of the relationship and whether the victim has reason to believe the threats can and will be carried out.<sup>41</sup>

Unfortunately, such a concept of coercive control is difficult to criminalise while domestic violence and domestic abuse appear to be understood as representing different forms of behaviour. Domestic violence encompasses physical forms of violence either as single incidents or several separate incidents, while domestic abuse has become more commonly associated with non-physical forms of abuse, sometimes non-criminal behaviour, and typically seen as less serious. This separation of physical and non-physical forms of domestic violence and/or abuse does not reflect the context of the relationship between the two parties or the complex way that both physical and non-physical forms of behaviour often co-exist. Therefore it can often be inappropriate to consider domestic abuse as a less serious harm than single incidents of physical forms of domestic violence.<sup>42</sup> The Home Office definition states that domestic violence and abuse involves:

Any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality.

Controlling behaviour is described as:

a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

Coercive behaviour is defined as 'an act or pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim'.<sup>43</sup> This definition suggests that domestic violence and domestic abuse are distinct terms, presenting them without hierarchy and without distinguishing between the separate characteristics of

<sup>38</sup> Dutton and Goodman (n 34) 748.

<sup>39</sup> K Fischer, N Vidmar and R Ellis, 'The Culture of Battering and the Roles of Mediation in Domestic Violence Cases' (1992) 46 *Southern Methodist University Law Review* 2117 for examples of how control is maintained through the victim's reading of non-verbal messages from the abuser.

<sup>40</sup> *Ibid* 2120.

<sup>41</sup> Dutton and Goodman (n 34) 747–8.

<sup>42</sup> S Cammiss, 'The Management of Domestic Violence Cases in the Mode of Trial Hearing: Prosecutorial Control and Marginalising Victims' (2006) 46(4) *British Journal of Criminology* 704 has observed that even single incidents of physical violence in a domestic setting have found to be minimised by prosecutorial practices within the Magistrates' Courts.

<sup>43</sup> Home Office Circular 003/2013 <[www.gov.uk/government/publications/new-government-domestic-violence-and-abuse-definition](http://www.gov.uk/government/publications/new-government-domestic-violence-and-abuse-definition)> accessed 9 June 2015.

the two.<sup>44</sup> The phrase domestic abuse is currently confusing and may promote the idea that abuse is less serious than domestic violence.<sup>45</sup> An offence named coercive control is preferable to domestic abuse because the control can take the form of physical and non-physical behaviours, or a combination of both. It is for this reason that the term domestic abuse, adopted in s 76, should not be seen as distinct from domestic violence. This would better convey the fact that coercive control is neither solely physical nor non-physical, but often a mixture of the two. The next section will look at the existing criminal law to highlight how it does not encompass coercive control within the non-fatal offences and the Protection from Harassment Act 1997.

### The recognised legislative gap

Following consultation, the Home Office concluded that there is a gap in the existing legal framework as it fails to recognise non-physical coercive and controlling behaviour.<sup>46</sup> A consideration of the legal framework reveals that the non-fatal offences are focused on single isolated incidents, thus not capturing the ongoing nature of domestic violence and/or abuse. The non-fatal offences have been construed narrowly where the victim experiences non-physical harm within the context of an intimate or family relationship. The primary legislation used to prosecute perpetrators of domestic violence and/or abuse remains the Offences Against the Person Act 1861 and the common law offences of assault and battery.<sup>47</sup> Analysing the theoretical underpinnings and practical application of these offences reveals that the courts conceptualise and measure harm without reference to context or the presence of coercive control. These offences are thus premised upon physically violent acts which cause predominantly physical injury with their place on the spectrum of harm being determined according to an objective standard of outcome. In this way, the law creates a hierarchy of harm that does not always correspond to the injury experienced by the victim from a pattern of coercive or controlling behaviour which may or may not involve physically violent acts.<sup>48</sup>

There is an assumption that different forms of violent behaviour will have similar consequences if the objective harm is the same. This approach does not account for the impact that an abuse of trust characteristic of an intimate relationship has on victims in this context.<sup>49</sup> The dynamics of domestic violence and/or abuse reveal that physical violence neither accurately encapsulates the nature and the impact of the harm involved, nor the ways in which particular vulnerabilities can be created and exploited by the abuser.<sup>50</sup> Using a model derived from stranger violence and premised upon physical assaults causing physical harm ignores the ways in which the harm of coercive control in an intimate or

44 L. Richards, S. Letchford and S. Stratton, *Policing Domestic Violence* (OUP 2008) 12 suggest that this inclusion reflects agencies' preference to use the term abuse which is better understood to refer to 'a pattern of behaviour which is both criminal and non-criminal in nature'.

45 Groves and Thomas (n 25) 5 emphasise that the term domestic abuse is less serious than physical violence according to health professionals whose priorities are based on matters of treatment rather than criminality leading to punishment.

46 Home Office, *Strengthening the Law on Domestic Abuse Consultation – Summary of Responses* (n 2) 11; the Law Commission is currently seeking views on whether to adopt a dedicated offence or offences to tackle domestic violence in a scoping exercise to ascertain responses to proposed reform of the Act, see Law Commission (n 2).

47 Criminal Justice Act 1988, s 39; *R v Venna* [1976] QB 421; *Fagan v Commissioner of Police of the Metropolis* [1969] 1 QB 439.

48 E. Stanko, *Violence* (Ashgate 2002) xiii.

49 Tadros (n 9).

50 Williamson (n 10); Stark (n 10); Kuennen (n 10).

family relationship is unique. This uniqueness is manifest precisely because the abuse is committed by an intimate in a context in which the perpetrator can exert coercion and exploit their knowledge of the particular vulnerabilities of the victim.<sup>51</sup> The incident-based approach taken towards non-fatal offences, alongside the focus on physical violence – except in limited circumstances<sup>52</sup> – results in the separation of individual incidents of violence from the context in which they occur. The construction of decontextualised acts of atomistic individuals to establish an offence means that the focus will necessarily be solely on the individual incident the defendant is being charged with. Norrie's critique of the criminal law process reveals that at the heart of modern criminal law exists a 'responsible individual' who is isolated from the real world and the social and moral contexts in which the crime occurs.<sup>53</sup> However, it is often only when the context of ongoing coercive control is taken into account that seemingly small and trivial incidents can be seen to have a detrimental effect on the victim. As a result of removing the individual from the context in which the crime occurs, the criminal justice system abstracts the criminal incident from the rest of the defendant's pattern of behaviour and actions.

The most recent conceptualisation of the types of harms for which redress may be provided under the 1861 Act is found in *R v Chan Fook*<sup>54</sup> and iterated more recently in *R v Dhalival*.<sup>55</sup> In *R v Chan Fook*, Hobhouse LJ stated that, while the phrase 'actual bodily harm' is capable of including psychiatric injury, 'it does not include mere emotions such as fear or distress nor panic' as to do so would be 'likely to create in the minds of the jury the impression that something which is not more than a strong emotion, such as extreme fear or panic, can amount to actual bodily harm'.<sup>56</sup> Hobhouse LJ's use of the phrases 'mere emotions' and 'not more than a strong emotion' trivialises responses such as these and, as noted by Munro and Shah, there is 'little recognition that emotional suffering, where it is severe in its effects and sustained in its duration, can have serious, harmful consequences'.<sup>57</sup> Following this judgment, non-physical harm is reduced to being 'either psychiatric or "merely" emotional, with only infliction of the former meriting criminalisation'.<sup>58</sup> This judgment reveals both the problematic nature of attempts to apply the existing offences against the person in the context of domestic violence and/or abuse, and perhaps judicial failure to comprehend the impact that an ongoing programme of abuse may have on a person unless it reaches a medically recognised threshold.

The requirement for bodily harm to the mind to amount to a recognisable psychiatric injury as opposed to psychological harm was reinforced by *R v Dhalival*.<sup>59</sup> In seeking to base a charge for constructive manslaughter on s 20<sup>60</sup> the prosecution argued that psychological harm as a result of a period of domestic violence and/or abuse (characterised by coercive control) amounted to bodily harm. On appeal it was questioned

51 L G Mills, *Insult to Injury: Rethinking our Responses to Intimate Abuse* (Princeton University Press 2003) 51; Williamson (n 10).

52 See discussion below of *R v Chan Fook* [1994] 1 WLR 689 (CA) and *R v Dhalival* [2006] EWCA Crim 1139; [2006] 2 Cr App R 24.

53 A Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2nd edn CUP 2001) 29.

54 *R v Chan Fook* (n 52).

55 *R v Dhalival* (n 52).

56 *R v Chan Fook* (n 52).

57 V Munro and S Shah, 'R v Dhalival Judgment' in R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart 2010) 261–72, 263.

58 Ibid 264.

59 *R v Dhalival* (n 52).

60 Offences Against the Person Act 1861, s 20, wounding or inflicting grievous bodily harm maliciously.



whether the s 20 offence could be based on non-physical injury. In approving the previous case law<sup>61</sup> and reaffirming the requirement for a recognised psychiatric injury, the court in *R v Dhalival* effectively ruled out the impact abuse can have upon a victim when there has not been a formal diagnosis of battered woman's syndrome or post-traumatic stress disorder.<sup>62</sup> The psychiatric experts in this case did not find evidence of recognisable psychiatric injury and, despite finding some features of depression that would have impacted on the victim's psychological functioning, the prosecution failed. *R v Dhalival* provided the Court of Appeal with the opportunity to reconceptualise bodily harm in line with the lived experiences of domestic violence and/or abuse victims. Viewing the 1861 Act as a 'living instrument'<sup>63</sup> would have allowed the recognition that significant psychological symptoms might, in cases where a minimum level of severity is attained, amount to bodily harm despite the lack of a medical diagnosis.<sup>64</sup> The court declined to take this approach, thus 'privileging . . . medical knowledge over a large body of social science research relating to the effects of domestic abuse' despite the fact that medical opinion is also uncertain and experts do not always agree.<sup>65</sup> This demonstrates the reliance on medical research as opposed to social-psychological research and a continuing focus on the victim as opposed to the behaviour of the perpetrator.<sup>66</sup> At the heart of this analysis is the semantic complexity requiring the term 'bodily harm' to incorporate psychological injury – a legislative indication that non-physical harm manifested through a pattern of coercive and controlling behaviour ought to remove the need for such creative judicial interpretations.

It has been argued that the existing criminal law framework under the Protection from Harassment Act 1997 can apply to domestic violence and/or abuse which has taken place over a period of time and is not dependent upon physical violence.<sup>67</sup> However, judicial interpretation of provisions has restricted the legislative framework in successfully encompassing patterns of behaviour amounting to coercive and controlling behaviour. The basic offence of harassment,<sup>68</sup> the more serious offence of causing fear of violence<sup>69</sup> and the offence of stalking<sup>70</sup> offer some protection to victims of coercive and

61 *R v Chan Fook* (n 52); *R v Ireland*; *R v Burstow* [1998] AC 147 (HL).

62 M Burton, 'Commentary on *R v Dhalival*' in Hunter et al (n 57) 258; and Lord Steyn in *R v Dhalival* (n 52).

63 *R v Ireland*; *R v Burstow* (n 61).

64 Munro and Shah (n 57) allow for this approach provided that the psychological harm reaches the threshold level of 'really serious harm' under *DPP v Smith* [1961] 3 WLR 546.

65 Burton (n 62) 258.

66 The Law Commission (n 2) suggests that new offences relating to domestic violence could be accommodated in a new framework for non-fatal offences. Specialised forms of offences could refer to cases where the victim is living with the defendant as a member of the family. Sentencing powers would then need to be appropriate to reflect this specialised factor. However, a framework that is innately concerned with physical violence would struggle to accommodate the non-physical forms of behaviour concerned with controlling behaviour, as illustrated by the judicial approach in respect of non-fatal offences.

67 In Home Office, *Strengthening the Law on Domestic Abuse Consultation – Summary of Responses* (n 2) 6 15% of respondents felt the current law was adequate; J Bindel, 'Criminalising Coercive Control Will Not Help Victims of Domestic Abuse' *The Guardian* (London 27 August 2014) <[www.theguardian.com/commentisfree/2014/aug/27/coercive-control-crime-domestic-abuse-women](http://www.theguardian.com/commentisfree/2014/aug/27/coercive-control-crime-domestic-abuse-women)> accessed 14 April 2015.

68 S 2.

69 S 4.

70 S 2A as amended by Protection of Freedoms Act 2012, s 111.

controlling behaviour.<sup>71</sup> For example, the offence of putting a person in fear that violence will be used against them<sup>72</sup> shows an appreciation of harm being inflicted without the use of physical violence and, instead, through the exertion of control over the victim by keeping them in a state of fear. Although, as Simester et al state, the term 'violence' still implies 'some kind of physical attack'.<sup>73</sup> Judicial interpretations have limited the applicability of these offences in cases involving coercive control within an intimate or family relationship. Firstly, these offences rely on establishing a course of conduct which amounts to two or more incidents, amounting to harassment<sup>74</sup> and having sufficient connection to each other.<sup>75</sup> Where the case reveals an ongoing relationship between the alleged victim and perpetrator, there is judicial reluctance to acknowledge the existence of a course of conduct with the required qualities. In *R v Hills*<sup>76</sup> the incidents relied upon to form the basis of the charge under s 4 were alleged to have occurred between April and October 1999. Allegations of ongoing violence between these dates were discounted for evidential reasons and it was further held that the incidents of physical assault were unrelated. The fact that the victim continued to live with the appellant throughout the period in which she claimed that he put her in fear of violence appears to have influenced the judicial disbelief of the alleged behaviour between the two incidents.<sup>77</sup> This disbelief appears in *R v Curtis* where the use or threats of violence over a nine-month period by the defendant towards the victim did not amount to a course of conduct given that the incidents were interspersed with affection between the two.<sup>78</sup> The case of *R v Widdows*<sup>79</sup> confirms this approach and indicates two assumptions. Firstly, that victims freely remain in a relationship characterised by coercive control and, secondly, that the abuse is less serious if it is in the context of a 'long and predominantly affectionate relationship in which both parties persisted and wanted to continue'.<sup>80</sup> This reasoning misunderstands the context and consequences of coercive control in intimate relationships. The perception of victims as autonomous individuals who remain in or return to the relationship because they freely choose to do so means that judges find it difficult to understand a victim who reports the behaviour of her partner but remains in the relationship. To interpret the legislation from this perspective ignores the dynamics and impacts of ongoing coercive control. It also undermines the potential utility of the offences contained in the 1997 Act to provide victims of domestic violence and/or abuse with adequate protection when the relationship is ongoing.<sup>81</sup> In fact, Otton LJ expressly regarded the Act as unsuited to this purpose, stating that the legislation was introduced

71 A P Simester, J R Spencer, G R Sullivan and G J Virgo, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn Hart 2013) 451 note 'no one would deny that courses of conduct aimed at destabilising and diminishing the quality of the victim's life are properly regarded as species of violence, notwithstanding the lack of any blow or physical attack'.

72 S 4.

73 Simester et al (n 71).

74 Protection from Harassment Act 1997, s 7(3), as inserted by the Serious Organised Crime and Police Act 2005, s 125(7).

75 *Lau v DPP* [2000] Crim LR 580; *R v Hills* [2001] Crim LR 318; Official Transcript (2000) No 00/4898/W5 CA (Crim).

76 *R v Hills* (n 75).

77 To the court's credit it was suggested that the prosecution would have been more successful had it pursued two separate charges under s 47 of the 1861 Act.

78 *R v Curtis* [2010] EWCA Crim 123; [2010] 3 All ER 849.

79 *R v Widdows* [2011] EWCA Crim 1500; [2011] Crim LR 959.

80 Ibid para 29.

81 As well as a criminal conviction under either s 2 or s 4, s 5 of the Protection from Harassment Act 1997 also provides for a restraining order to be attached to the sentence for either of these offences.

in the context of stalking, which implies a stranger or estranged spouse as the intended defendant.<sup>82</sup> Such a limit is not contained within the legislation itself, although clearly such an interpretation leaves coercive and controlling behaviour in intimate or family relationships lawful until s 76 of the 2015 Act enters into force.

Secondly, despite the inclusion of ‘a course of conduct’ in the offences under the 1997 Act and the recognition in the Home Office’s report on stalking<sup>83</sup> that ‘each stalking case is unique and highly personalised, involving an idiosyncratic combination of . . . a wide range of other diverse types of behaviour’, the judgments lapse back into examination of individual incidents of assault and battery and whether or not these, in combination, amount to a course of conduct. For example, in *Lau v DPP*,<sup>84</sup> where two incidents were proved,<sup>85</sup> the court took the view that the fewer the number of incidents and the longer the time span between them, the less likely it would be that a finding of a course of conduct amounting to harassment could reasonably be made.<sup>86</sup> There are clear difficulties with proving many of the incidents which could be used to demonstrate a course of conduct for the purposes of harassment when they take place in the context of an intimate relationship, typically with no witnesses.<sup>87</sup> Therefore the court needed to recognise that, in a case involving domestic violence and/or abuse, there are likely to be other non-disclosed incidents and that two proven ones should suffice for a conviction. As the court did not, the efficacy of this offence in domestic violence and/or abuse characterised by coercive control is marginal. Had the judiciary provided a broader interpretation of a course of conduct amounting to harassment in the context of intimate or family relationships, it would be harder for future courts to view two incidents or more of coercive or controlling behaviour occurring in an intimate relationship as isolated and unrelated.

Whether or not the 1997 Act was intended for use within the context of relationships involving violence and/or abuse, it could have been applied in this way. The use of credible threats and other methods to maintain control over the victim by keeping them in fear of violence or other unwanted events is central to domestic violence and/or abuse involving coercive and controlling behaviour. These aspects quite clearly fit with the requirements for a course of unwanted conduct that may not be sinister when taken out of context, for example, the delivering of flowers or repeated phone calls, but that can take on a more sinister persona in the context of an unwanted or coercive and controlling relationship. That the legislation has not been interpreted in this way displays a lack of judicial comprehension of the dynamics of domestic violence and/or abuse and has given rise to a legislative gap in this context.

Ormerod has argued that s 4 ‘represents a distinct offence focused not on harassment, but on the graver wrong of creating fear of violence’.<sup>88</sup> Had the legislation been interpreted in this way it could have provided the potential for a case to be brought against a perpetrator of coercive control in an intimate or family relationship who used

82 *R v Hills* (n 75) para 31.

83 E Finch, ‘The Perfect Stalking Law: An Evaluation of the Efficacy of the Protection from Harassment Act 1997’ (2002) *Criminal Law Review* 704; T Budd and J Mattinson, *The Extent and Nature of Stalking: Findings from the 1998 British Crime Survey* (Home Office Research Study 210, Home Office Research, Development and Statistics Directorate October 2000).

84 *Lau v DPP* [2000] 1 FLR 799.

85 Although numerous more were alleged.

86 *Lau v DPP* (n 84) para 15; similarly see *R v Hills* (n 75) discussed above. Cf *Pratt v DPP* [2001] EWHC 483 (Admin); (2001) 165 JP 800.

87 *Burton* (n 62).

88 D Ormerod, *Smith and Hogan’s Criminal Law* (13th edn OUP 2011) 704.

surveillance, credible threats and intimidation to put the victim in fear of violence. Although this may have been restricted to fear of *physical* violence being used, it would at least have enabled a case to be brought when fear of violence based on past incidents of physical violence is being used by the abusive partner to maintain power and control.<sup>89</sup> However, the approach taken in *R v Curtis*<sup>90</sup> construes s 4 in the broader context of the Act, requiring proof that the course of conduct putting the victim in fear of violence also amounts to harassment. Ormerod asserts that this is only of practical significance 'if there are circumstances in which two or more incidents with a sufficient nexus caused a fear of violence without also being harassing', which he concludes would be unlikely.<sup>91</sup> However, in the context of the violence and/or abuse, conduct not deemed 'harassing' may still be capable of creating fear in the victim in the context of the relationship and therefore the s 4 offence is more relevant.<sup>92</sup> In addition the 'fear of violence' needed is too limited as the victim must be afraid that violence *will* be used. In *R v Henley*,<sup>93</sup> Pill LJ emphasised that a course of conduct which caused a generalised state of fearfulness or a fear for the safety of others would not suffice. There would need to be two specific incidents which directly caused the victim to fear violence. Hence, it is not enough that the victim is seriously frightened of what might happen or frightened that violence will be used against members of her family. Therefore, coercive and controlling behaviours used as techniques for domestic violence and/or abuse are excluded, unless the victim could prove she was afraid that violence would be used against her at that particular time, and not merely of the possibility that it might be used against her.

Finally, the defendant must either know or ought to know that his course of conduct will cause another to fear violence on each of the occasions. The defendant can be convicted if any 'reasonable person' in possession of the same information would have known that such conduct would put a person in fear of violence.<sup>94</sup> Findings by magistrates and juries that a reasonable person would have realised that someone would be put in fear of violence may be shaped by their existing preconceptions.

Clearly, the consultation's conclusion that a legislative gap exists in respect of coercive and controlling behaviour in an intimate or family relationship is a correct one.

### Applying the new offence of controlling or coercive behaviour

The Serious Crime Act 2015 seeks to address this legislative gap. Section 76 states:

- (1) A person (A) commits an offence if—
  - (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
  - (b) At the time of the behaviour, A and B are personally connected,
  - (c) The behaviour has a serious effect on B, and
  - (d) A knows or ought to know that the behaviour will have a serious effect on B.

89 Kelly and Johnson (n 9).

90 *R v Curtis* (n 78).

91 Ormerod (n 88).

92 Williamson (n 10).

93 *R v Henley* [2000] Crim LR 582; Official Transcript (2000) No 99/0356/W3 CA (Crim).

94 S 4(2).

## REPEATED OR CONTINUOUS BEHAVIOUR

The new offence has sought to create a new model that moves away from that presented in the harassment and stalking offences. The course of conduct terminology is avoided and in its place the defendant must have repeatedly or continuously engaged in the prohibited behaviour towards the victim. The course of conduct model was initially proposed as was the suggestion that a single act of coercive control would suffice.<sup>95</sup> The deletion of the single act adds credibility to the offence, by ensuring it 'specifically criminalise[s] patterns of coercive and controlling behaviour'.<sup>96</sup> Requiring repeated or continuous behaviour highlights that this offence is not concerned with criminalising ordinary everyday behaviour between partners.<sup>97</sup> Although acknowledging the difficulties associated with the course of conduct model identified above, Youngs persuasively suggests that the move away from the familiar model may hinder the 'transition to the new criminal regime'<sup>98</sup> as it does not replicate the non-statutory definition. Her preferred approach would be to retain 'a course of conduct' defined in the context of a domestic violence offence as 'a pattern of behaviour encompassing at least two manifestations of domestic violence'.<sup>99</sup> Given the examination of judicial interpretations of 'a course of conduct' in the context of harassment and stalking, it is foreseeable that Youngs' proposal would retain assessments of 'incidents' and the tendency to focus on physical incidents. The legislative decision to move entirely away from the problematic 'course of conduct' model provides the opportunity for fresh judicial understandings of domestic violence and/or abuse to emerge.

Youngs' suggestion would link the course of conduct to domestic violence as opposed to a course of conduct that manifests in at least two criminal incidents. The continued confusion over the term domestic violence and/or abuse, discussed above, would inhibit the effectiveness of her provisional proposal. While the dominant societal perspective continues to view domestic violence as physical acts and domestic abuse as non-violent and less serious, judicial interpretations will continue to reflect this. Section 76 avoids this by linking the behaviour to control and coercion. The requirement that the defendant engages in repeated or continuous behaviour that is controlling or coercive enables the court to consider the broader context of the relationship. For Hanna, the opportunity for the victim to narrate the experience of the whole relationship has evidential benefits, as well as creating a criminal justice system that is empathetic and understanding. The context of the relationship becomes relevant to prosecutorial cases when the focus is not on establishing separate incidents. The goal of the new offence is to respond to the legislative gap identified and provide further protection from the actual impact coercive and controlling forms of domestic violence and/or abuse has on those experiencing it. Enabling the whole story to be relevant to the case 'connects the personal to the political' and the hope that the law will be systemically reshaped is validated.<sup>100</sup>

95 Serious Crime Bill 2014–2015, Notices of Amendment 7 January 2015; House of Commons Public Bill Committee Serious Crime Bill 2014–2015 Written Evidence (22 January 2015) SC12.

96 Home Office, *Strengthening the Law on Domestic Abuse Consultation – Summary of Responses* (n 2) 11.

97 A fear that received some media attention, see, for example, J Griffiths, 'Husbands who Shout at their Wives or Hold Hands with their Partner could be Jailed under New Law' *Akashic Times* (31 December 2014) <<http://akashictimes.co.uk/husbands-who-shout-at-their-wives-or-hold-hands-with-their-partner-could-be-jailed-under-new-law/>> accessed 14 April 2015.

98 J Youngs, 'Domestic Violence and the Criminal Law: Reconceptualising Reform' (2015) 79(1) *Journal of Criminal Law* 55, 67.

99 Ibid 69.

100 Hanna (n 14) 1462.

## COERCIVE OR CONTROLLING BEHAVIOUR

An interesting anomaly in the content of the new offence is the lack of definition provided for the terms ‘controlling’ and ‘coercive’. In addition the offending behaviour suggests that controlling behaviour does not also need to be coercive to satisfy the offence. A possible option available to the courts when interpreting the terms is the non-statutory definition which describes controlling behaviour as:

a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

Whereas, coercive behaviour is defined as:

an act or pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.<sup>101</sup>

Useful though these terms may be, the legislation itself does not confirm that the offence is to be interpreted in light of these definitions. Given that coercive behaviour is to be construed as repeated or continuous, it is hard to envisage that the behaviour concerned will not be both controlling and coercive.

## A AND B ARE PERSONALLY CONNECTED

The offence relates only to situations where A and B are personally connected,<sup>102</sup> meaning within ‘an intimate or family relationship’.<sup>103</sup> Section 76(2) states:

A and B are ‘personally connected’ if—

- (a) A is in an intimate personal relationship with B, or
- (b) A and B live together and—
  - (i) They are members of the same family, or
  - (ii) They have previously been in an intimate personal relationship with each other

There is considerable difficulty in determining the relationship parameters of domestic violence and/or abuse and the inclusion of describing those personally connected as ‘members of the same family’ is particularly difficult. In HMIC, *Everyone’s Business: Improving the Police Response to Domestic Abuse*, police officers felt that the term had become too inclusive due to its coverage of some family relationships, which meant in their opinion that a domestic violence response was not always appropriate in the circumstances and did not always represent the same risk of harm or control compared to intimate partners.<sup>104</sup> In another context, Reece reflected similar concerns in relation to the term ‘associated persons’.<sup>105</sup> She argued that reasons for violence that takes place between heterosexual couples or former couples differ and require different responses than other forms of family violence.<sup>106</sup> Youngs extends Reece’s argument to the context of criminal law, agreeing that, as violence is qualitatively different where it takes place in certain relationships compared to others, the same law should not apply.<sup>107</sup> Caution should be applied when determining who

<sup>101</sup> Home Office (n 12).

<sup>102</sup> S 76(1)(b).

<sup>103</sup> S 76(2).

<sup>104</sup> HMIC (n 3) 30.

<sup>105</sup> Family Law Act 1996, s 62, as amended by Domestic Violence, Victims and Crime Act 2004, pt 1, s 4.

<sup>106</sup> H Reece, ‘The End of Domestic Violence’ (2006) 69(5) *Modern Law Review* 770.

<sup>107</sup> Youngs (n 98).

can experience domestic violence and/or abuse. Empirical research is finding that forms of coercive control can occur within same-sex relationships, although a lack of data keeps this issue relatively hidden.<sup>108</sup> The gender-neutral approach taken in s 76 appropriately includes all intimate personal relationships whether current or at an end.

That the behaviour should not overlap with child abuse offending was raised in the responses to the government definition and was the basis for limiting the application to individuals aged 16 or above. A concern was expressed that this excludes teenage personal relationships, a problem highlighted by Barter<sup>109</sup> and which seems to be overcome by s 76(3) which excludes from the offence personal connections where the defendant 'has responsibility for B under the Children and Young Person Act 1933, s. 17' and where B is under 16. This is a clear indication that the focus is not on parental relationships, while at the same time extending the offence to relationships where one or both parties are under the age of 16. The ability of this offence to extend to teenage relationships is strengthened by s 76(2)(a) which does not limit 'intimate personal relationships' to those living together and can therefore including dating relationships.<sup>110</sup>

All other forms of family relationships are not excluded by the offence. Members of the same family are further defined in s 76(6) with all but one of the categories listed referring to people who have or have had an intimate personal relationship (if the terms are understood in their traditional sense). Section 76(6)(c) stands out as it refers to relatives as defined by Family Law Act 1996, s 63(1), which clearly includes non-intimate relationships.<sup>111</sup> The inclusion of all relatives that live within the same household within this offence locates the offence within the domestic setting. However, different family relationships have a different nature and quality to those between intimates. Expected levels of trust involved between members of family relationships are varied and often not equally distributed, unlike the levels of trust that grow within an intimate personal relationship. Therefore, the inclusion of all family relationships may continue societal confusion over forms of domestic violence and/or abuse that are coercive and controlling.

### BEHAVIOUR HAS A SERIOUS EFFECT ON B

The requirement that controlling or coercive behaviour has a serious effect on B is a problematic aspect of the *actus reus* of the offence.

Section 76(4) states:

A's behaviour has a 'serious effect' on B if—

- (a) It causes B to fear, on at least two occasions, that violence will be used against B, or
- (b) It causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities.

108 C Donovan and M Hester, *Domestic Violence and Sexuality: What's Love Got to Do with It?* (Policy Press 2014); C Donovan and M Hester, 'I Hate the Word "Victim": An Exploration of Recognition of Domestic Violence in Same Sex Relationships' (2010) 9(02) *Social Policy and Society* 279–89.

109 C Barter, 'In the Name of Love: Partner Abuse and Violence in Teenage Relationships' (2009) 39(2) *British Journal of Social Work* 211; C Barter, M McCarry, D Berridge and K Evans, 'Partner Exploitation and Violence in Teenage Intimate Relationships' (NSPCC, 2009) <[www.nspcc.org.uk/inform](http://www.nspcc.org.uk/inform)> accessed 14 April 2015.

110 Youngs (n 98) 69. Youngs' provisional proposal would not accommodate dating relationships.

111 Family Law Act 1996, s 63(1), defines relative, in relation to a person, as: a) the father, mother, stepfather, son, daughter, stepson, stepdaughter, grandmother, grandfather grandson or granddaughter; or b) the brother, sister, uncle, aunt, niece, nephew or first cousin (whether of the full blood or the half blood of by marriage or civil partnership).

What amounts to a serious effect on B will raise issues as to whether a subjective or objective approach should apply.<sup>112</sup> The wording suggests that a subjective approach will apply as the victim will have to actually experience 'fear' that violence will be used against them or 'serious alarm or distress'. A subjective approach will limit the application to those who are able to appreciate or verbalise the impact of the harm they are experiencing, having left their 'hostage-like' state.<sup>113</sup> As highlighted above, until non-violent forms of controlling and coercive behaviour and their harm are better understood by the public, victims and judiciary, assessing the impact the behaviour has had on the recipient will be difficult. The Mothers' Union suggested that the harm be described as 'having a serious effect on B or has the potential of having a serious effect on B', however, until the injury caused is more widely understood, the problem of subjectivity, or objectivity, would remain.<sup>114</sup> Evidential factors would involve medical assessments of the victim, placing the victim's mental capacity into the forefront of the case. Care should be taken to ensure that the restrictive approach to psychological harm adopted in the case law surrounding non-fatal offences is not continued in this context. A move away from such an approach can easily be achieved as s 76(4) specifically refers to states of mind, such as fear, alarm and distress, rather than physical injuries.

In determining whether the serious alarm or distress has a 'substantial adverse effect on the person's day-to-day activities',<sup>115</sup> an objective test ought to be avoided in order to assist in achieving Parliament's aim to address the unique harm involved. A concern with an objective test would be the task of conveying the impact that a series of coercive behaviours has had on the victim in question, particularly where these are the result of gestures, phrases and looks that have meaning only to those within the relationship as outlined by Williamson.<sup>116</sup> Youngs adopts Burke's proposal, describing the harm as 'restricting the victim's "freedom of action"',<sup>117</sup> This is a useful and preferred approach that focuses less on the mental capacity of the victim and her reactions to the offending behaviour. It more adequately reflects the nature of coercive control as a liberty crime. It remains to be seen how courts will interpret the phrase 'serious effect on B' for this offence without resorting to victim-blaming and asking why the victim didn't leave if the effect of the behaviour was so bad. The knowledge that there is support available to victims of domestic violence may make it harder for others to comprehend the extent and impact of the defendant's controlling and coercive behaviours upon the victim. Hanna warns that new legal advances that seek to help are likely to create new challenges and dilemmas.<sup>118</sup>

#### **MENS REA — KNOWS OR OUGHT TO KNOW THAT THE BEHAVIOUR WILL HAVE A SERIOUS EFFECT ON B**

Section 76(1)(d) states the *mens rea* requirement for the offence is either knowledge that the prohibited behaviour will have a serious effect on B or that the defendant ought to have knowledge of it. Section 76(5) clarifies that for (1)(d) the defendant 'ought to know' that which a reasonable person in possession of the same information would know. As noted by

<sup>112</sup> House of Commons Public Bill Committee (n 95) SC10.

<sup>113</sup> Youngs (n 98)

<sup>114</sup> House of Commons Public Bill Committee (n 95) SC10.

<sup>115</sup> S 76(4).

<sup>116</sup> Williamson (n 10); Dutton and Goodman (n 34); Fischer et al (n 39).

<sup>117</sup> Youngs (n 98); A Burke, 'Domestic Violence as a Crime of Pattern and Intent' (2007) 75 *George Washington Law Review* 602.

<sup>118</sup> Hanna (n 14).



Finch, this objective standard was deemed necessary under the 1997 Act, where for neither offence is it necessary to prove an intention to cause fear of violence or a sense of harassment in order to ensure comprehensive protection for all victims. For the victim, the behaviour is 'no less harmful because it is unintentional hence an objective *mens rea* requirement' is more appropriate.<sup>119</sup> Enshrining an objective approach, s 76 prevents A from escaping liability by claiming that they did not know their behaviour would have a serious effect on B.

However, this is not to say that difficulties with this objective standard do not exist. Subsections 76(4)(a) and (b) both require that the behaviour has a 'serious effect' on B and thus the focus is on the effect that the behaviour has on the victim, not the intention of A. This effectively ostracises the motive of the defendant – controlling the victim – from the *mens rea*. Under Youngs' proposed offence, a requirement of 'intent to establish or exercise power and control' would provide an 'ulterior intent that goes "beyond" the act done by the defendant'.<sup>120</sup> It would further prevent the focus of attention being on the victim, with assessments of their reaction being based upon misconceptions of the harm of coercive control and judgments concerning why they remained in the relationship. In continuing to focus on the effect upon the victim, the criminal law continues to focus on the actual injury inflicted upon the victim, not on the motivations of the offender, avoiding wider questions of why the perpetrator acted as they did and why they exert the coercive control integral to the harm.<sup>121</sup> However, the objective standard means that to escape liability the perpetrator cannot claim that he did not know what he was doing would have a serious effect on the victim, or that behaviours he thought were 'reasonable' in the context of a relationship where male control and dominance are seen as natural by society. It is also suggested that the evidential difficulties that will be unavoidable in some cases of coercive control would be amplified by a *mens rea* of intention. To prove that the defendant intended to carry out the *actus reus* of the offence would be difficult. The defendant could simply claim that they just wanted their partner to be at home for a particular reason or did not realise that preventing their partner from leaving the house on occasions would have that effect upon her, whereas, the harm to the victim is the same regardless of the intention of the perpetrator.

The objective *mens rea* could explain why the maximum penalty for the offence stands at 5 years;<sup>122</sup> if the *mens rea* was solely based on A having an intention to seriously affect B it would be a crime of specific intent and thus more serious in terms of culpability. It is suggested that the maximum sentence under s 76 does not reflect the severity of the harm of coercive control and leads to the creation of a hierarchy of harm when compared with the maximum sentences for physical harm available under the 1861 Act. However, given the difficulties outlined above, the objective standard is to be welcomed as providing the best possibility of securing a conviction given the present limitations to legal and societal understandings of coercive control.

#### 'BEST INTERESTS' DEFENCE

Under s 76(8) it is a defence for A to show that, in engaging in the behaviour in question, they believed they were acting in B's best interests, and that the behaviour was, in all the

119 Finch (n 83).

120 Youngs (n 98) 68.

121 Ibid 61.

122 Serious Crime Bill (2014–2015), Notices of Amendment 7 January 2015 (NC3) suggested a maximum imprisonment not exceeding 14 years.

circumstances, reasonable. Although the defence is not available in relation to behaviour that causes B to fear that violence will be used against them,<sup>123</sup> concerns have still been raised about this defence in relation to the ease with which it could be manipulated by the perpetrator. Women's Aid notes that:

the very nature of much psychological abuse is designed to ensure the victim believes they are in the wrong and the perpetrator is protecting or helping them.<sup>124</sup>

Perpetrators commonly tell victims that they are carrying out certain abusive behaviours 'for their own good' and this is a key element of coercive control. As shown by Williamson's research findings, perpetrator and victim perceptions of what is 'real' are frequently distorted, with victims often internally redefining their version of reality to match the version presented by the perpetrator. They may come to believe the abuse is their fault and, in order to reconcile the experience of domestic violence and/or abuse, may internalise the anger and feel there is something wrong with them for causing or allowing the violence and/or abuse.<sup>125</sup> This belief could be manipulated by the defence, especially when the victim is being cross-examined in court. In addition, magistrate and judicial preconceptions concerning violent and/or abusive relationships may make them predisposed to view the behaviour as 'reasonable' because they cannot understand the context in which behaviours that can be part of normal everyday life take on a coercive and controlling nature within the context of a specific abusive relationship.

The defence also appears to re-produce the hierarchy of harm, discussed above, which is common in legal understandings of domestic violence and/or abuse because it is only available for an offence under s 76 (4)(b) and not when A causes B to fear that violence will be used against them.<sup>126</sup> This implies that it is never reasonable or in someone's best interests to use violence against them, but it can be reasonable to cause someone serious alarm or distress which has a substantial adverse effect on their usual day-to-day activities.

### Conclusion

The above analysis indicates that the creation of an offence of controlling or coercive behaviour in an intimate or family relationship is necessary in order for the criminal law to better reflect the reality of the central harm of domestic violence. In examining the protection available under the criminal law, it was shown that a legislative gap exists which leaves many victims of domestic violence and/or abuse without adequate legal protection and that there is a failure of the state to condemn such behaviours. Much of the wording of the new offence is to be welcomed as reflecting an understanding of the dynamics and harm of domestic violence and/or abuse. It remains to be seen, however, whether this recognition will continue when the new offence is interpreted and applied by the criminal justice agencies. In addition, the authors are aware that a number of difficulties remain. First, there are questions over how the new offence will fit within the existing criminal law framework in terms of the non-fatal offences and charges of child abuse. Secondly, there is a potential concern that the new offence will add to the perception of a hierarchy of harm that already exists if it is seen as a lesser offence, with physical harm continuing to be seen as more serious and thus deserving of a higher sentence. The third difficulty that can be

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<sup>123</sup> S 76(9).

<sup>124</sup> Women's Aid, 'Briefing on the Serious Crime Bill: Clause 73 – Controlling or Coercive Behaviour in an Intimate or Family Relationship' (Women's Aid 2015) <[www.womensaid.org.uk/page.asp?section=00010001001000330002](http://www.womensaid.org.uk/page.asp?section=00010001001000330002)> accessed 14 April 2015.

<sup>125</sup> Williamson (n 10).

<sup>126</sup> S 76(4)(a).

foreseen relates to the need to avoid double-charging and indictments will have to be carefully worded to ensure that this is avoided. Considerations will arise where the existence of physical violence in the past would be needed in order to establish that the behaviour of the perpetrator had a 'serious effect' on the victim for the purposes of the new offence. In conclusion, the new offence is necessary, but with it will come new concerns about evidence and proof.

